*Zakaria bin Husin*,[2] where in a claim for personal injuries sustained in an accident in a forest logging area, the respondent (the plaintiff at first instance) sued all the three defendants (one being the appellant) jointly and severally and also in the alternative. He not only pleaded that at the material time he was jointly and severally employed by each of the three defendants respectively but also that the third defendant was the servant and agent of the second defendant and the latter the servant or agent of the first defendant. Under those circumstances, the Federal Court held that the respondent was not precluded from proceeding against the other defendants, including the appellant, after obtaining default judgment against the third defendant. This is so as the pleadings clearly show that the third defendant was sued jointly or severally in his capacity as the agent or the servant of the first and/or the second defendant or alternatively in his capacity as a principal. Estoppel was held not to have risen under those circumstances.

Unlike *Syarikat Perniagaan's* case,[2] the facts of the instant case are distinguishable in that there is only one cause of action, that of a breach of the agreement entered into by the plaintiff with the first defendant but executed by his lawful attorney, the second defendant. However, the plaintiff has also pleaded in the alternative that either one or both the defendants return the $397,500 paid by him to the second defendant pursuant to the agreement and it is this alternative plea which the plaintiff relies on to rebut the contention that the doctrine of election does not apply.

This I do not agree as what is pleaded by the plaintiff in the alternative is an alternative remedy ie the return of the $397,500 which he maintains he is entitled to claim in the event his prayer for the specific performance of the agreement fails. The plea does not, I consider, introduce an alternative cause of action against any of the defendants. The only cause of action pleaded is the breach of the agreement entered by the plaintiff with the first defendant as principal and the second defendant as his lawful attorney. In that capacity, the second defendant is clearly an agent of the first defendant and when judgment in default was entered against him, the plaintiff's cause of action as against the first defendant has merged in the default judgment as a result of which he cannot justifiably maintain the same cause of action against the first defendant. If actions can be brought and judgments recovered against the agent and afterwards the principal, there would be two judgments for the same debt or cause of action. This I consider would be contrary to justice.

The fact that the default judgment was entered under O 13 r 4(1) is quite immaterial as that order and rule is qualified to the extent that where a default judgment has been entered against one defendant for possession of immovable property, the plaintiff can still proceed with the action against the other defendants, if any. The words 'if any' limit the right of continuing the action against the other defendants and since the plaintiff in the instant case had exercised his option to enter judgment against the second defendant, he is barred from continuing with the same cause of action against the first defendant as the principal of the second defendant.

On that reasoning, I had accordingly allowed the first defendant's application with costs and ordered that the statement of claim against him be struck off.

*Order accordingly.*

Solicitors: *James Foong & Anad*; *Shook Lin & Bok*.

Reported by *Teo Keang Sood*

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## Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd

HIGH COURT (JOHORE BAHRU) – COMPANIES WINDING UP NO 42-132-87
ZAKARIA YATIM J
14 APRIL 1988

*Companies and Corporations – Winding-up petition – Application for petition to be struck off – Alleged debt disputed – Whether petitioner is really the creditor – Companies Act 1965, ss 217 & 218(2)(a)*

*Civil Procedure – Winding-up petition – Locus standi – Rules of the High Court 1980, O 18 r 19*

*Civil Procedure – Winding-up petition – Application for order to strike out petition under O 18 r 19(1)(d) of the Rules of the High Court 1980 – Affidavit evidence admissible – Rules of the High Court 1980, O 18 r 19(1)(d)*

This is an application by the respondent company for an order of the court that the petition filed by the petitioner to wind up the respondent company be struck off under O 18 r 19 of the Rules of the High Court 1980. The respondent contended that the alleged debt arose from breaches of contract on the part of the respondent company and that in fact, the petitioner had a debit balance.

**Held,** allowing the respondent's application: (1) It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and the respondent company is a debtor.

(2) From the evidence, it is clear that the respondent company disputed the alleged debt claimed by the petitioner. Indeed, the respondent company claimed that the petitioner is in a debit balance. In the circumstances, the petitioner is not a creditor as envisaged in s 217 of the Companies Act 1965.

(3) The petitioner is not entitled to file the petition as it has no *locus standi*. The action of the petitioner in filing the petition is an abuse of the process of the court.

**Cases referred to**
1 *Re Lympne Investments Ltd* [1972] 2 All ER 385 (refd)
2 *Mann & Anor* v *Goldstein & Anor* [1968] 2 All ER 769 (refd)
3 *New Straits Times (Malaysia) Bhd* v *Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 (refd)
4 *Re St Piran Ltd* [1981] 3 All ER 270 (refd)

**Legislation referred to**
Companies Act 1965 ss 217, 218(2)(a)
Rules of the High Court 1980 O 18 r 19(1)(d)

*Ong Ban Chai* for the petitioner.
*SP Lim (George Puthucheary* with him) for the respondent.
*Mr Jegathesan* for the Official Assignee.

*Cur Adv Vult*

**Zakaria Yatim J.**: This is an application by the respondent company for an order of the court that the petition filed by the petitioner to wind up the respondent company be struck off and/or dismissed with costs under O 18 r 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the court.

The respondent is a company registered in Malaysia and carries out the business of a housing developer and its registered address is suite D23, 2nd Floor, Plaza Pekeliling, Jalan Tun Razak, Kuala Lumpur. The petitioner is a contractor who, under an agreement, carried out work for the respondent company at lot 1055, 9th mile, Jalan Cheras, Kuala Lumpur.

The petitioner issued a notice to the respondent company under s 218 of the Companies Act 1965 demanding the respondent company to pay the petitioner, within 21 days from the date of the service of the notice, the sum of $2,938,651.97 ($1,354,202.39 being the balance of contract price together with the sum of $1,584,449.58 being the balance of agreed interest and other charges from 30 June 1986 to 31 August 1987) together with interest thereon at the rate of 8% per annum from 1 September 1987.

On 12 October, 1987, the petitioner filed his petition. According to the petition, the respondent company was indebted to the petitioner in the sum of $2,934,651.97 ($1,354,202.39 being the balance of contract price together with the sum of $1,584,449.58 being the balance of agreed interest and other charges from 30 June 1986 to 31 August 1987) together with interest thereon at the rate of 8% per annum from 1 September 1987. The petition also stated that the respondent company made no payment as required in the notice within a period of 21 days. It will be noted that the petition is based on the ground that the respondent was unable to pay its debt under s 218(2)(a) of the Companies Act 1965.

In its affidavit opposing the petition, the respondent company averred as follows. Sometime in 1983, the respondent company invited tenders for the project from intending contractors to undertake building works in the normal manner. The petitioner was one of the tenders with the highest tender price of $14,111,000. In spite of this, the respondent company, at the meeting of its directors on 11 July 1983, awarded the contract of the project to the petitioner. One of the main reasons as to why the petitioner was selected was because of an oral inducement and incentive of the petitioner's offer to discount the contract price of $14,111,000 and the quantum of discount was fixed at 12.45%, which discount was accepted by the board of directors and became an oral agreement. On 31 May 1986, there was a mutual agreement to determine the contract. Pursuant to the mutual agreement, the parties agreed to appoint a quantity surveyor to carry out a final joint survey of the work done at the site by the petitioner up to 30 April 1986. It was further agreed by both parties that the findings of the quantity surveyor would be final to the extent stated by him in the report and binding on both parties. The term of the said agreement is as follows:

> We, the undersigned, do hereby appoint and instruct Messrs Fong Seng Yong, chartered quantity surveyor, to carry out the final survey on site on our behalf of works executed up to 30 April 1986 in respect of the above mentioned works. The report and decision of Messrs Fong Seng Yong will be final and binding on us.

The above agreement was duly signed by both the petitioner and the respondent company. The quantity surveyor subsequently submitted his report where he arrived at a figure of $10,747,260.20. According to the respondent company, a sum of $9,375,568.29 ought to be deducted from the above sum, as moneys already paid to the petitioner. The respondent company claimed to deduct a further sum of $1,074,762.02 being retention money. The respondent company contended that having added all the deductions, there was no balance of contract sum for work done outstanding in favour of the petitioner. Instead, the petitioner was in a debit balance to the extent of $1,039.744. The respondent company contended that the alleged debt of $1,584,449.58 arose from alleged breaches of contract on the part of the respondent company (see the affidavit of Ho Bok Sing filed on 8 March 1988 in support of the present application).

It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and the respondent company is a debtor. A creditor is a person who could enforce his claim against the company by an action of debt and a person cannot petition as a creditor when he merely has a right of action against the company for unliquidated damages for breach of contract (see Pennington's *Company Law* (1985) 5th Ed p 843). Where a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor (see *Re Lympne Investment Ltd*[1] at p 389). If the petitioner is not a

creditor, it is not entitled to present a petition or apply for a winding-up order. It has no locus standi and the petition must fail (see *Mann & Another* v *Goldstein & Another*[2] at p 771).

From the evidence adduced before this court, it is clear that the respondent company disputed the alleged debt claimed by the petitioner. Indeed, the respondent company claims that the petitioner is in a debit balance to the extent of $1,039,744. In the circumstances, the petitioner is not a creditor as envisaged in s 217 of the Companies Act. Therefore, the petitioner is not entitled to issue the statutory notice or file the petition, as it has no locus standi. The action of the petitioner in issuing the notice and filing the petition is an abuse of the process of the court.

Mr Ong Ban Chai, counsel for the petitioner, submitted that the court should only consider the words of the petition and not rely on affidavit evidence. In support of his submission, he cited the case of *New Straits Times (Malaysia) Bhd* v *Kumpulan Kertas Niaga Sdn Bhd & Anor.*[3] But in the present case, the respondent company is relying on O 18 r 19(1)(d) and not r 19(1)(a). Therefore, affidavit evidence is admissible.

On final question to be considered is whether it is too late for the respondent company to make the present application. The petition was filed on 12 October 1987. The application was filed on 8 March 1988, a delay of about five months. In fact in the present case, a hearing date for the petition has already been given. In my opinion, it is not too late for the respondent company to file the present application (see *Re St Piran Ltd*[4] at p 273).

For the reasons stated above, the petition is struck out under O 18 r 19(1)(d) of the Rules of the High Court and under the inherent jurisdiction of the court. The petitioner will pay the costs of this application to the respondent company.

*Order accordingly.*

Solicitors: *Ong Ban Chai & Co.*; *SP Lim & Co.*

Reported by *Ng Sheau Jiuan*

## Pasaraya Seri Sayang Sdn Bhd v Majlis Perbandaran Pulau Pinang

HIGH COURT (PENANG) – ORIGINATING SUMMONS NO 31-818-87
MOHAMED DZAIDDIN J
13 NOVEMBER 1987

*Landlord and Tenant – Repossession of leased premises due to rental arrears – Whether repossession was done without tenant's consent – Whether there was waiver on landlord's part as to his right of re-entry – Whether seven days' notice is unreasonable – National Land Code 1965, s 234 – Specific Relief Act 1950, s 8(1)*

By a tenancy agreement, the defendants let to the plaintiffs the demised premises for a period of two years. Clause 2 of the agreement stated that if the rent shall at anytime be in arrears and not paid for 14 days after it becomes due, then the defendants may re-enter upon the premises. As the plaintiffs had been in arrears of rental and the notice of demand of rental had not been complied with, the defendants repossessed the premises. The plaintiffs applied for a declaration that the forfeiture of the demised premises by the defendants is illegal and void or, alternatively, that they had been dispossessed of the demised premises otherwise than in due course of law.

The defendants submitted that they repossessed the demised premises legally and had exercised their rights under the tenancy agreement and in compliance with ss 234 and 235 of the National Land Code. The plaintiffs, on the other hand, argued that as the forfeiture was enforced by re-entry into the demised premises and not by any order of court, it must therefore be subject to the provisions of 'any other written law for the time being in force' (in the words of s 234 of the National Land Code) and that this law is found in ss 7 and 8 of the Specific Relief Act 1950.

**Held,** dismissing the application: (1) Under s 8(1) of the Specific Relief Act 1950, the plaintiffs must satisfy this court that they have been dispossessed of the demised premises without their consent and that such dispossession was otherwise than in due course of law.

(2) Whether consent was given or not is a question of fact. Weighing the affidavits of both sides, on the balance of probabilities, the plaintiffs have failed to prove that the dispossession was without their consent.

(3) There was no waiver on the part of the defendants. Giving a further time before the re-entry and not enforcing it strictly to comply with the term of the notice to deliver up vacant possession cannot in the circumstances of this case constitute a waiver. There must be some positive acts of waiver.

(4) The question of whether a notice of seven days to deliver up vacant possession was unreasonable depends on the circumstances of each case. In this instance, the period of seven days is reasonable.

**Legislation referred to**
National Land Code 1965 ss 213, 234, 235
Rules of the High Court 1980 O 18 r 19
Specific Relief Act 1950 ss 7, 8(1)

*K Balasundaram* for the plaintiffs.
*Lourdunathan Andrew* for the defendants.

*Cur Adv Vult*